

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROGER and ELISE MURRAY,

Plaintiffs,

v.

SOUTHERN ROUTE MARITIME, S.A.,
et al.,

Defendants.

No. C12-1854RSL

ORDER GRANTING IN PART
DEFENDANTS' MOTION TO
TAKE ADDITIONAL DEPOSITIONS

This matter comes before the Court on "Defendants' Motion fo Leave to Take Additional Depositions and for Related Extension of Discovery Deadline." Dkt. # 60. Having reviewed the memoranda, declarations, and exhibits submitted by the parties, the Court finds as follows:

Defendants argue that the ten-deposition limit imposed by Fed. R. Civ. P. 30(a)(2)(A)(i) needs to be increased because this case is unusually complex, as demonstrated by the fact that plaintiffs have identified 168 witnesses, including fourteen experts. Defendants seek permission to depose eight additional witnesses¹ and request an extension of the May 11, 2014, discovery cutoff in order to conduct the depositions.

¹ Defendants initially sought permission to take seventeen additional depositions, but the Court has already determined that defendants may not depose the staff at CETRI.

ORDER GRANTING IN PART DEFENDANTS'
MOTION TO TAKE ADDITIONAL DEPOSITIONS

1 Despite the rhetoric and the number of witnesses,² this case is not particularly
2 complex. Mr. Murray alleges that he was shocked by an electric current while working on
3 defendants' vessel and that he has suffered significant and diverse physical injuries as a result
4 thereof. He has, however, been unable to specify how he came into contact with an electric
5 current, and there do not appear to be any eye witnesses. Defendants are prepared to argue that
6 Mr. Murray was not, in fact, shocked while working on the vessel or, in the alternative, that the
7 event was minor and the injuries of which he complains are not causally connected to the
8 electrocution. None of these issues is "novel" or otherwise difficult to comprehend: they do not
9 justify a near doubling of the number of depositions specified in the rules.

10 Although plaintiffs have opposed defendants' motion on the grounds that (a)
11 additional depositions are unnecessary and (b) the request for the depositions came too late in
12 the discovery period, the record shows that plaintiffs were, up to a certain point, willing to allow
13 defendants to exceed the ten-deposition limit. Pursuant to the case management schedule,
14 plaintiffs disclosed their experts and provided reports on March 12, 2014. Defendants
15 immediately indicated that they would need an extension of the discovery cutoff to complete the
16 depositions, but plaintiffs resisted, noting that the case management order provided two months
17 in which to accomplish post-disclosure discovery. Decl. of C. Steven Fury (Dkt. # 72-1), Ex. 11.
18 When defendants identified three experts, Dyer, Paxson, and Morse, for deposition, plaintiffs did
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20 ² Plaintiffs' extensive and indiscriminate identification of "each individual likely to have
21 discoverable information" may be objectionable, but it does not justify the additional depositions.
22 Plaintiffs arguably used the Rule 26(a)(1)(A)(i) disclosures to hide the ball: rather than disclose only
23 those witnesses plaintiffs "may use to support [their] claims," as required by the rule, they appear to
24 have listed every person who was present on or near the vessel on January 16, 2010, and who may be
25 familiar with Mr. Murray's post-accident deficits, regardless of whether plaintiffs have any intention of
26 calling them at trial to support their claims. Had defendants sought the Court's intervention to compel
plaintiffs to cull their disclosures, the motion would likely have been granted. As it was, however,
plaintiffs provided basic information regarding the witnesses' connection with the case, and defendants
made knowing choices regarding their deposition strategy with full knowledge of the limitations
imposed by Rule 30(a)(2)(A)(i).

1 not object regarding the number of depositions noted and promptly advised that the three experts
2 were available within the time frames requested. Second Decl. of Barbara L. Holland (Dkt.
3 # 78), Ex. B. Plaintiffs also took the initiative to provide information regarding the availability
4 of their damage experts and Mr. Murray's main treating physicians. Decl. of C. Steven Fury
5 (Dkt. # 72), Exs. 7-9. Thus, plaintiffs were previously willing to schedule ten depositions,
6 including four of the eight depositions defendants now seek, on or before April 15th. On March
7 26th, plaintiffs' counsel reiterated that he would do his "very best to provide dates for
8 depositions of any witnesses [defendants] wished to depose," but pushed defendants to identify
9 the witnesses sooner rather than later because "professional witnesses are . . . not typically
10 available on a very short time frame." Decl. of C. Steven Fury (Dkt. # 72-1), Exs. 11-12. The
11 same message was conveyed on April 1st, at which point defendants advised that they would
12 like to take the depositions at a later time. Decl. of C. Steven Fury (Dkt. # 72-1), Exs. 14-15.

13 The record shows that defendants failed to follow up on their request for
14 deposition dates for approximately a month.³ Despite the fact that plaintiffs had shown a
15 willingness to allow defendants to exceed the ten-deposition limit and had provided (and
16 revised) dates on which their experts were available for deposition, defendants waited until April
17 14th to announce that they would like to schedule nineteen depositions between April 21st and
18 May 9th. Second Decl. of Barbara L. Holland (Dkt. # 78), Ex. C. Plaintiffs refused to stipulate
19 to this aggressive schedule, and defendants filed this motion on April 17th. Two of the nineteen
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22 ³ Defendants now assert that they were so convinced by plaintiffs' argument regarding the order
23 in which expert disclosures should be made and the depositions taken that they "agreed to wait to take
24 these depositions until after issuing their experts' rebuttal reports." Reply (Dkt. # 77) at 5. There is no
25 indication that plaintiffs were told of this supposed agreement, however, and they in fact had insisted
26 that discovery be completed on time and continued to press defendants for a list of deponents so that the
depositions could be scheduled. Before defendants took the risk of sidelining themselves from
discovery based on their own calculation of what was "fair," they should have reached an agreement
with plaintiffs to extend the discovery deadline or obtained an amended case management schedule.

1 requested depositions were scheduled between April 14th and the close of discovery on May 11,
2 2014.

3 Federal Rule of Civil Procedure 30(a)(2)(A)(i) presumptively limits the number of
4 depositions in a civil action to ten per side. The Court relies on this limitation in setting the case
5 management schedule: two months is allocated between the exchange of expert reports and the
6 close of discovery knowing that, even if the case relies heavily on expert testimony, the parties
7 have such a limited number of depositions that they can normally be scheduled and conducted in
8 the time allowed without impacting the dispositive motion and trial schedule. Although the
9 Court has the authority to alter the discovery limits imposed by the rules (Fed. R. Civ. P.
10 26(b)(2)(A)), the party seeking to exceed the limit has the burden of making a particularized
11 showing of need for each additional deposition. Thykkuttathil v. Keese, 294 F.R.D. 601, 602
12 (W.D. Wash. 2013). In addition, defendants bear the burden of showing good cause to extend
13 the discovery deadline. Fed. R. Civ. P. 16(b)(4).

14 Rule 16(b)'s "good cause" standard primarily considers the diligence of the party
15 seeking the amendment. The district court may modify the pretrial schedule "if it
16 cannot reasonably be met with the diligence of the party seeking the extension."
17 Fed. R. Civ. P. 16 advisory committee's notes (1983 amendment)
18 Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). See also Zivkovic v.
19 S. Cal. Edison Co., 302 F3d 1080, 1087-88 (9th Cir. 2002) (where plaintiff failed to
20 "demonstrate diligence in complying with the dates set by the district court," good cause was not
21 shown).

22 Defendants have not made much of a showing regarding their need to depose any
23 of the witnesses discussed in their motion. They do little more than identify the contours of the
24 witnesses' potential testimony and argue that they must be permitted to depose anyone plaintiffs
25 may call at trial in order to avoid surprise. If such a generalized need-to-avoid-surprise rationale
26 were sufficient, the limitation on the number of depositions imposed by the rules would be

1 essentially meaningless. On the other hand, plaintiffs had, until recently, been willing to
2 concede that some additional depositions were necessary and appropriate in this case. Plaintiffs
3 have made no attempt to explain why their willingness to cooperate in the scheduling of the
4 depositions evaporated a month before the discovery cutoff passed. Plaintiffs were apparently
5 willing to schedule ten depositions between March 26th and April 15th, but could only manage
6 to schedule and defend two depositions between April 14th and May 11th.

7 Having reviewed the memoranda, declarations, and exhibits in this matter, the
8 Court finds as follows:

9 • Drs. Tempest, Cahn, and Glisky – Defendants have made an adequate showing of need
10 and diligence with regard to these witnesses. Although defendants have the witnesses' expert
11 reports and chart notes, defendants are justifiably interested in having the opportunity to probe
12 the opinions offered before going before the jury. Plaintiffs tacitly acknowledged the need for
13 these depositions when they offered dates shortly after the expert reports were exchanged.
14 Delaying the depositions of these witnesses until after the experts generated their reports was
15 sensible, and there was still adequate time to schedule the depositions when plaintiffs balked.

16 • Drs. Kojnok and DeSautel – Defendants have not made an adequate showing of
17 diligence with regards to these witnesses, both of whom were disclosed in February 2013.
18 Defendants offer no explanation for their failure to depose these witnesses earlier.

19 • Dr. Lee – Defendants have made an adequate showing of need and diligence with
20 regards to this witness. Dr. Lee was first disclosed on March 12, 2014, and has information
21 regarding a significant aspect of Mr. Murray's claimed damages. There was adequate time to
22 schedule the deposition when plaintiffs balked.

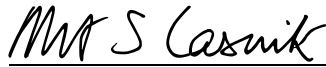
23 • Rule 30(b)(6) Designee of ILWU Local 19 – Defendants have not made an adequate
24 showing of need or diligence with regards to this deposition. The election procedures of the
25 union that currently employs Mr. Murray is of relatively minor significance to this case, and
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1 defendants were aware of the issue since Mr. Murray was deposed in September 2013. To the
2 extent defendants' discovery efforts aimed at the union were stymied, they had other options for
3 compelling the production of the requested information.

4 ● Captain Paxson – Defendants have made an adequate showing of need and diligence
5 with regards to this witness. Although defendants have his expert report, they are justifiably
6 interested in having the opportunity to probe the opinions offered before going before the jury.
7 Plaintiffs tacitly acknowledged the need for this deposition when they offered dates shortly after
8 the expert report was exchanged. Delaying Captain Paxson's depositions until after he had
9 generated his expert reports was sensible, and there was still adequate time to schedule the
10 deposition when plaintiffs balked.

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12 For all the foregoing reasons, defendants' motion is GRANTED in part and
13 DENIED in part. The parties shall work together to schedule the depositions of Dr. Tempest,
14 Dr. Cahn, Dr. Galinsky, Dr. Lee, and Captain Paxson within twenty-one days of the date of this
15 Order. The remaining case management deadlines are unchanged.

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17 Dated this 22nd day of May, 2014.

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19 Robert S. Lasnik
20 United States District Judge